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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 82

FRANK COOK,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

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Opinions Below.

The opinion of the District Court (R. 62) is reported in 51 F. (2d) 292. That of the Circuit Court of Appeals (R. 95) is reported in 56 F. (2d) 921.

Jurisdiction.

The final decree of the Circuit Court of Appeals (R. 106) was entered March 18, 1932. The petition for a writ of certiorari was filed May 16, 1932. The writ of certiorari was granted October 10, 1932.

The jurisdiction of this Court rests upon Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether a seizure of a British vessel beyond the three-mile limit at a point 11½ miles from the coast of the United States but at a locality not in conformity with the provisions of the Treaty between the United States and Great Britain, dated May 22, 1924, is valid.

2. Whether the Treaty between the United States and Great Britain of 1924 limited, modified or abrogated the search and seizure provisions of the Tariff Acts of 1922 and 1930.

3. Whether libels in admiralty under Section 584 of the Tariff Act of 1930 can be sustained against a British vessel and its cargo when the seizure of the vessel was made by officers of the Coast Guard 11½ miles from the coast of the United States but at a greater distance than the vessel could traverse in one hour, which seizure is not in conformity with the Treaty between the United States and Great Britain dated May 22, 1924.

Statutes and Treaty Involved.

The pertinent provisions of the Tariff Acts of 1922 and 1930 and of the Treaty between the United States and Great Britain of May 22, 1924, are printed in the Appendix (*infra* pp. 43-47).

Statement of Facts.

Briefly, the facts are that on the evening of November 1, 1930, the Mazel Tov was boarded by officers of the United States Destroyer Tucker, 11½ miles off the coast of Massachusetts. The vessel at the time was under way, but upon being signaled by the Coast Guard promptly stopped (R. 39).

Her sole cargo, outside of sea stores, consisted of 403 sacks of intoxicating liquors, which had been cleared at St. Pierre on October 16th. There was no evidence that the Mazel Tov had either been in communication with the American shore or had unladen any part of her cargo (R. 43, 33).

Upon request of the boarding officer, the Master of the Mazel Tov produced a manifest, her certificate of British registry, clearance papers and crew list. The manifest, written in French, shows the port of departure to have been St. Pierre and gives the destination of the vessel as "Nassau, et la haute mer" (R. 22-24).

Following inspection by the boarding crew, the Mazel Tov was taken in tow by the Coast Guard vessel at a point approximately 13 miles from the nearest point of land, the vessel having drifted some distance during the period of inspection, and ultimately given into the custody of the Collector of Port for the District of Rhode Island (R. 41).

These are two actions in admiralty which by stipulation of counsel and order of the Court were heard jointly, and for the purpose of appeal were consolidated. The first, a libel *in rem* against the British vessel Mazel Tov, for violation of Sections 584 and 585 of the Tariff Act of 1930, contained three counts alleging: (1) That the Master failed to produce a manifest; (2) that there was on board merchandise not

described in the manifest; (3) that the vessel arrived within the limits of a Collection District and attempted to depart therefrom without making entry (R. 1-5).

The second libel sought the forfeiture under Section 584 of the Tariff Act of 1930 of the cargo *ex* British Motor Screw Mazel Tov on the ground that there was found on board unmanifested cargo consigned to the Master of the vessel (R. 6-8).

The claimant filed answers and exceptions to both libels on December 2, 1930. The answers and exceptions raised *in limine* the contention that the seizure was unlawful and that the penalties and forfeitures could not lawfully be imposed in view of the place of the seizure (R. 12-16).

The Government in its first libel (R. 3) raised the question of the Treaty between the United States and Great Britain and sought collection of the penalties under Section 584 of the Tariff Act for alleged violation of the Treaty.

In relation to the destination and speed of the vessel, the District Judge in his opinion (R. 62) says:

> "The evidence indicates that the Master of the Mazel Tov did not intend to approach nearer than four leagues to our coast. The point of land from which the Mazel Tov is here found to have been eleven and one-half miles distant is a small island, "No Man's Land," lying some distance at sea off the island of Martha's Vineyard (R. 63).
>
> "The speed of the Mazel Tov under normal conditions was not in excess of ten knots. Her certificate of registration gives the speed as nine knots, which is not inconsistent with the size of the vessel and motors with which it is equipped" (R. 63).

No evidence was presented by the government which would suggest that these speeds were not substantially correct.

Upon hearing of the libels and answers, the District Judge dismissed both libels and, among others, made the following conclusions of law:

> "(a) The Court holds that under the provisions of Section 584 of the Tariff Act of 1930 the Master of the British Motor Screw Mazel Tov did not become liable to a penalty of $500 for not producing a manifest to the Coast Guard officer who demanded it and that the paper introduced by the claimant constituted a manifest within the meaning of Section 584 of the Tariff Act (R. 86).
>
> "(b) The Court holds that under the provisions of Section 584 of the Tariff Act of 1930 the Master of the British Motor Screw Mazel Tov did not become liable to a penalty of $14,286.18 for having on board said vessel merchandise not included or described in any manifest because the seizure was made beyond the three-mile limit and not in conformity with the Treaty entered into between the United States and Great Britain, promulgated May 22, 1924, 43 Stat. 1761" (R. 86-87).

In the matter of the cargo *ex* British Motor Screw Mazel Tov the Court found that under the provisions of Section 584 of the Tariff Act of 1930 the liquors were not forfeited to the United States because the seizure was made beyond the three-mile limit and beyond the distance from shore that the vessel could traverse in one hour's sailing time, and was not made in conformity with the Treaty entered into between Great Britain and the United States (R. 91).

The District Judge found the following facts:

> "(a) That the British Motor Screw Mazel Tov was seized at a point 11½ miles off the coast of Massachusetts.

"(b) That the Master produced a manifest when commanded to do so by an officer of the Coast Guard.

"(c) That the maximum speed of the British Motor Screw Mazel Tov at the time of seizure was between nine and ten knots an hour" (R. 85-86).

At the time of the hearing in the District Court, the Court treated the question of the effect of the Treaty as properly raised by the answers and exceptions and held that the vessel had been seized in violation of the British-American Treaty of May, 1924.

Appeal having been taken by the United States, the Circuit Court of Appeals for the First Circuit reversed in part the decree of the District Court and held that the seizure at the place as found by the District Court was valid under Section 581 of the Tariff Act of 1930 and that the British-American Treaty of 1924 in no way modified or abrogated the aforementioned Section of the Tariff Act; and the vessel was subject to having the penalties assessed against the Master under Section 584 collected out of vessel (R. 95).

Specification of Errors.

1. The Court of Appeals erred in holding that the seizure of a British vessel 11½ miles from the coast of the United States but at a greater distance than the vessel could traverse in one hour was a valid seizure (R. 103).

2. The Circuit Court of Appeals erred in holding that the Treaty with Great Britain of 1922 did not limit the search and seizure provisions of the Tariff Acts of 1922 and 1930 to British vessels within one hour's travel from the coast of the United States (R. 103).

3. The Court of Appeals erred in holding that libels could be sustained under Section 584 of the Tariff Act in view of the locality of the seizure, being at a point beyond that provided by the Treaty (R. 106).

Summary of Argument.

1. The United States has always strictly maintained that three miles from the coast marks the limit of territorial waters (P. 8).

2. Prior to the Treaty of 1924 and subsequent to the passage of Section 581 of the Tariff Act of 1922, Great Britain refused to consent to searches and seizures within twelve miles from the coast (P. 12).

3. The protests of Great Britain against seizures of British vessels by the United States beyond the three-mile limit after the enactment of the Eighteenth Amendment was one of the principal reasons for the Treaty of 1924 (P. 14).

4. The Treaty of May 22, 1924, dealt completely with the seizure of British vessels beyond territorial waters, that is, beyond the three-mile limit (P. 17).

5. Section 581 of the Tariff Act of 1922 was passed by Congress at the risk of international complications and for the purpose of searching and seizing British and other foreign liquor vessels pending negotiations of rum-smuggling treaties (P. 27).

6. Congress did not intend to alter the status and effect of the Treaty of 1924 when it re-enacted in 1930 sections 581 and 584 of the Tariff Act of 1922, and the Treaty amounts to a limitation of these sections (P. 29).

7. The libels under Section 584 should not be sustained in view of the locality of the seizure, being at a point beyond that provided by the Treaty (P. 32).

8. Question properly raised below: The controlling

question in the District Court and the Court of Appeals was whether the seizure was lawful in view of Treaty provisions and the Government should not be permitted to change the theory of the case in this Court on review (P. 35).

ARGUMENT.

I.

The United States Has Always Strictly Maintained That Three Miles From the Coast Marks the Limit of Territorial Waters.

Two principal questions are here presented: First, whether a seizure of a British vessel eleven and one-half miles from the coast of the United States but at a greater distance than she could traverse in one hour, as provided for by the Treaty between the United States and Great Britain, is valid; and second, whether libels for penalties may be sustained as a result of such a seizure.

One necessarily includes the other. The petitioner's contentions are that the seizure was unlawful, beyond the territorial waters of the United States as well as beyond a point permitted by the Treaty between the United States and Great Britain; and that the penalties cannot be lawfully imposed. Accordingly, the vessel and cargo should be released.

On January 22, 1875, Mr. Fish, Secretary of State, wrote to Sir Edward Thornton, British Minister:

> "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast." Foreign Relations 1875, 1, 649-650; 1 Moore's Digest of International Law 731;

Notes to Great Britain VII, 185; Cunard S. S. Co. v. Mellon, 262 U. S. 100, 122.

Beyond the limit of the marine league lie the high seas over which no nation can exercise jurisdiction. A ship or vessel upon the high seas is subject solely to the jurisdiction of the nation whose flag she flies. No other nation, apart from Treaty, may lawfully interfere with her.

Extraterritorial acts are founded upon acquiescence rather than upon the right to exercise jurisdiction beyond the three-mile limit.

Under the Act of March 2, 1799, ch. 22, 1 Stat. 627, this Government has never claimed jurisdiction beyond the three-mile limit in exercising the authority to board within four leagues of our coast. The Secretary of State explained to Sir Edward Thornton, British Minister, January 22, 1875, that such boarding is made upon the implied consent of vessels voluntarily coming to an American port since "no vessel is boarded, if boarded at all, except such a one as, upon being hailed may have answered that she was bound for the United States."

In *The Coquitlam* (1893), 57 Fed. 706, one of the early cases of seizure beyond the three-mile limit but within four leagues from the coast, the District Court forfeited the vessel. The Circuit Court of Appeals (77 Fed. 44) reversed the decree and held that the sealing vessel was not bound for the United States and that the unloading was not unlawful. The American and British Claims Arbitration Tribunal awarded damages against the United States for the seizure of The Coquitlam in the amount of $48,000.

An examination of the reported cases discloses no instance of a seizure of a vessel hovering along our coast, which had never come directly or by means of its

own boats within the territorial waters of the United States, with the exception of certain sealing vessels, for which seizures the United States was compelled to pay damages, until after the passage of the Prohibition Act in 1919.

Church v. *Hubbart*, 2 Cranch 18, 2 L. Ed. 249.
Rose v. *Himely*, 4 Cranch 241, 2 L. Ed. 608.
Hudson v. *Guestier*, 6 Cranch 281, 3 L. Ed. 224.
Wheaton International Law, Dana's Ed. 1866, p. 259, note 108.
The Appollon, 9 Wheat. 362, 371; 6 L. Ed. 111.
1 *Moore's Digest*, 278.
1 *Hyde*, 418, note 5.
1 *Moore*, 908.
1 *Moore*, 922.

Thus, for more than one hundred years, this Government in enforcing the Revenue Acts had not seized foreign vessels beyond the three-mile limit when these vessels had not come within the three-mile limit directly or through their own boats. In 1921-1922 there was a departure by this Government which resulted in the seizure of foreign vessels beyond the three-mile limit, which had communicated with the shore by means of boats not their own. The British Government protested and protested earnestly. They rejected a proposal to allow unlimited search within twelve miles from the coast.

On September 21, 1922, the "Tariff Act of 1922" was passed, 42 Stat. 858. This Act, among other things, permitted and authorized the boarding, searching and seizing of "any ship or vessel" within four leagues, or twelve miles, from the coast of the United States, modifying the legislative principle which had been on the statute books for one hundred and twenty-

three years. The Tariff Act of that year made the former provisions applicable to all ships in an effort to exercise jurisdiction over foreign vessels beyond the three-mile limit contrary to its own position on the question of territorial jurisdiction.

In the same month, the United States District Court in Massachusetts decided *The Grace and Ruby Case*, 283 Fed. 475. The vessel being partly owned by an American, the case was heard solely upon the question of jurisdiction. The exceptions were overruled and District Judge Morton said:

> "The act of unlading, although begun beyond the three-mile limit, continued until the liquor was landed, and the schooner was actively assisting in it by means of her small boat and three of her crew who were on the boat for that purpose."

The British Government was not prepared to acquiesce and on December 30, 1922, the British Ambassador addressed a note to the Secretary of State, in part as follows:

> "In order to avoid the possibility of any misunderstanding, I am desired by my Government to make it clear that His Majesty's Government is unable to acquiesce in what they understand to be the ruling of the United States Government, namely, that foreign vessels may be seized outside of the three-mile limit, if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. My Government must reserve their right to lodge a protest in any individual case in which action may be taken by the United States under this ruling."
>
> M. S. Records, Department of State, released February 20, 1927.

The Henry L. Marshall, 286 Fed. 260 (Oct., 1922), affirmed 292 Fed. 486, following the principle of *The Grace and Ruby* and *Church* v. *Hubbart, supra.* The Henry L. Marshall, an alleged British vessel, was seized in the summer of 1921 nine or ten miles from the coast of the United States. She had unloaded liquor into motor boats not her own, which had taken it within the three-mile limit. *No boat belonging to the Marshall and no member of her crew came within the three-mile limit.* The vessel was forfeited.

The British Government protested against this seizure. The protest was finally withdrawn upon the ground that the vessel was not of *bona fide* British registry, but in withdrawing the protest the British Government did not acquiesce in the principle of the ruling. See Statement of Honorable Charles E. Hughes, January 23, 1924, American Journal International Law, Vol. 18, No. 2, p. 229.

II.

Prior to the Treaty of 1924 and Subsequent to the Passage of Section 581 of the Tariff Act of 1922 Great Britain Refused to Consent to Searches and Seizures Within Twelve Miles from the Coast.

The United States realized after the Prohibition laws went into effect that international complications would necessarily arise in connection with their enforcement. While maintaining the three-mile limit as the boundary of territorial waters, they were attempting to assert the right of extra-territorial seizures that resulted in protests from foreign governments.

With this view in mind, on June 26, 1922, the Secretary of State addressed a note to the British Ambassador, inquiring whether the British Government

would be disposed to conclude "a Treaty for the purpose of checking illegal practices in question. Such a Treaty might contain the reciprocal right of each government to exercise a right of search of vessels of the other nation beyond the three-mile limit of territorial waters to the extent of twelve miles from the shore."

The British Government replied through its Ambassador in Washington on October 13, 1922, stating, among other things, that they could not acquiesce in the abandonment of a principle by extending the limit of territorial waters. The proposed Treaty was accordingly rejected.

Department of State Press, Released October 16, 1922.

Negotiations were again renewed on June 12, 1923, proposing again the right to search and seize within twelve miles. On June 14, 1923, the British Government again rejected the proposed Treaty. On July 19, 1923, the Secretary of State addressed a note in part as follows:

"The proposed special agreement would bear only upon those vessels which come within twelve miles, but hover off the three-mile limit for the purpose of aiding in the smuggling of intoxicating liquors or other prohibited articles into the territory of the United States."

M. S. Records, Department of State Press Release, Feb. 20, 1927.

The following seizures by the United States and the subsequent release of the vessels indicates the position of the United States prior to the Treaty, nothwithstanding the authority conferred by Section 581.

III.

The Protests of Great Britain Against Seizures of British Vessels by the United States Beyond the Three-Mile Limit After the Enactment of the Eighteenth Amendment Was One of the Principal Reasons for the Treaty of 1924.

After the seizure of the Marshall, this Government seized a considerable number of British vessels under the same circumstances; that is, vessels which had never directly or by their small boats or crew come within the three-mile limit. The British Government vigorously protested these seizures.

The records of the State Department reveal the following information regarding seizures of foreign vessels; some of them are understood to have been released under the order of the Attorney General.

The British schooner C. H. Anderson, seized February 23, 1925, eleven miles off Montauk Point, Long Island, released for lack of evidence of contact with shore; British schooner Kwasind, cleared from Nassau to Halifax with cargo of liquor, but found far off her course to her destination on a sand bar and rescued by a Coast Guard cutter, which took it to port. The British Government vigorously protested against subsequent proceeding and the ship was released.

According to press reports the following seizures were made: British sloop Buema and The Etta B, seized September 14, 1922, eight and four miles respectively from the coast; British ship Emerald, seized in October, 1922, eight miles from the shore, released after British protest; British schooner Grace and Edna seized eight miles off the Jersey coast, released October 31, 1922; British schooner Minnie E. Mintus, seized more than three miles off Galveston, Texas, January 6, 1924. Jessup Law of Territorial Waters, p. 254.

The British ship, Marion L. Mosher, was seized on July 27, 1923, between seven and eight miles off the American coast near Fire Island. According to the testimony offered in Court, the vessel had been within the twelve-mile limit for twenty-three days without making the required report to the Custom House. The vessel was further charged with unloading within the twelve-mile limit. While libels were pending in Court, the British Government was protesting against these seizures outside the three-mile limit. As a result, it was ordered by the Attorney General of the United States that the ship and its cargo be released upon giving of bond to proceed to its destination.

On November 10, 1922, the Treasury Department, upon request of the Department of State and the Department of Justice, published an order directing the release of all foreign vessels seized outside the three-mile limit where there was no evidence of communication with the shore by means of the vessel's own boat. The order is a follows:

"November 9, 1922,
The Collector of Customs,
New York, N. Y.

Sir:—

The Department is in receipt of your telegram of the 8th instant, relative to the seizure of the British auxiliary Schooner M. M. Gardner, on September 13, 1922.

It appears from your report that the seizure was made outside the three-mile limit, and that while the master admitted unlading part of the cargo beyond the three-mile limit there is no evidence that the vessel was communicating with the shore by means of her own boats or equipment.

Under these circumstances it is the desire of the Department of State and the Department of Jus-

tice that all foreign vessels so seized shall be released, and you will be governed accordingly. A report should be made to the Department in each instance.

Respectfully,

s/d A. W. MELLON,
Secretary."

According to the New York Times of November 11, 1922, about twenty vessels were released in accordance with the above order, reloaded with their cargoes and conveyed to the point of seizure. Section 581 of the Tariff Act of 1922 was in force at the time of the above order and it is reasonable to assume that the Treasury Department, Department of Justice and the State Department were cognizant of its provisions in respect to searches and seizures when the order of November 9, 1922, was issued.

On July 10, 1923, the British Ambassador at Washington addressed a note to the Secretary of State in part as follows:

> "Accordingly, 'in order to avoid the possibility of any misunderstanding' the British Ambassador under instructions from London stated 'that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation.' "
>
> M. S. Records, State Department, released Feb. 20, 1927.

It is safe to assume that because of the attitude of foreign governments the Government of the United States was actuated in ordering the release of all vessels seized beyond the three-mile limit that had not made contact with the shore with their own boats and we believe that the United States discontinued the

practice of such seizures and again negotiated with Great Britain to bring about a treaty between the two nations to effectively cure the situation that confronted and embarrassed the United States in attempting to seize foreign ships under the theory of extraterritorial municipal law.

During 1923 continued negotiations were carried on between the Government of the United States and Great Britain to bring about a treaty satisfactory to both. The Courts were divided as to the right to seize foreign vessels and the various Departments of the Government were likewise apprehensive and realized the embarrassing situation that confronted the United States.

The Courts and the Executive Departments were aware of the fact that even though the Courts might sustain the seizure of foreign vessels in cases of "Unit of Control," that did not preclude a foreign government from claiming damages as a result of the seizure under the rule of International Law recognized and insisted upon by most nations, particularly Great Britain and the United States.

IV.

The Treaty of May 22, 1924, Dealt Completely With the Seizure of British Vessels Beyond Territorial Waters, That Is Beyond the Three-Mile Limit.

On January 23, 1924, the Secretary of State announced a treaty with Great Britain to prevent the smuggling of intoxicating liquors. The announcement was made in an address before the Council on Foreign Relations in New York City. The Secretary of State reviewed at length the international problems which had arisen out of the seizures of foreign vessels be-

yond the three-mile limit and which it was the purpose of the Treaty to set at rest. The Secretary of State said in part:

> "The Government of the United States has repeatedly asserted that the limits of territorial waters extend to three marine miles outward from the coastline. * * * It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and in order to avoid liability to other Governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized."
>
> American Journal International Law, Vol. 18, No. 2, p. 229.

The Treaty was signed on January 23, 1924. Ratifications were exchanged and the Treaty proclaimed by the President on May 22, 1924 (43 Stat. 1761).

The President described the Treaty in his proclamation as a convention "to aid in the prevention of the smuggling of intoxicating liquors into the United States."

In the preamble of the Treaty it is recited that the two nations,

> "Being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of intoxicating beverages:
>
> "Have decided to conclude a convention for that purpose; * * *"

The convention, or such parts thereof as are pertinent hereto, are set out on page 43-47 (*infra*).

The Treaty expressly stated therein to have been for the purpose of "avoiding any difficulties which might arise" between the United States and Great Britain

"in connection with the laws in force in the United States on the subject of alcoholic beverages."

There had been difficulties. The United States had seized vessels beyond the three-mile limit, as in this case, which had neither themselves nor by their own boats come into the waters of the United States. Such vessels had always been regarded by both nations and by international law as being on the high seas and immune—if the sovereign chose to insist upon it—from any exercise of authority by another nation.

The Treaty concluded to define the jurisdiction which the United States might exercise beyond the three-mile limit. The rights conferred were strictly limited and exclusive. In Article I of the Treaty the two nations agree that it is their firm intention to uphold the principle that *three* marine miles from low water mark constitute the proper limits of territorial waters.

The rights conferred upon the United States for dealing with vessels carrying or suspected of carrying alcoholic liquors were exclusive. Paragraph 3, Article II, of the Treaty provides:

> "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

Only the specific jurisdiction mentioned in the Treaty was conferred and all other was prohibited.

In *The Frances Louise,* 1 Fed. (2d) 1004, 1005-6, Judge Morton said:

> "At the time of the seizure the treasury officials were under the impression that the Katherine B was capable of making the distance from the

Frances Louise to land within one hour. It was upon this ground that the schooner was seized as coming within the provisions of the treaty between this country and England which went into effect on May 22, 1924. Subsequent investigation showed that the Katherine B was not capable of such speed. The government officials thereupon asserted the right to seize the schooner outside of the provisions of the treaty. No contention is now made by the government that the seizure is within the terms of said treaty. The government's present contention is that as the schooner was 'trading with the shore'—by which is meant that she was delivering alcohol to small boats which put out from the shore—she is subject to seizure and forfeiture under the general principles of international law; and that the treaty does not cut down this general right of seizure.

"I have great doubt whether any such broad right of seizure exists as the government contends. But it is not necessary to decide this question, because I am clearly of the opinion that the whole situation is covered by the treaty. The circumstances surrounding the execution of that treaty are matters of general knowledge. Vessels of British registry were lying off our coasts, delivering liquor to small boats, which smuggled it ashore. Seizures of such vessels were made by our officials, which were regarded by the British government as unjustified by international law, and led to representations by the British government to this country. On the other hand, British ships found themselves much embarrassed by the decision of the Supreme Court in Cunard S. S. Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306, concerning supplies of liquor which they customarily carried for use on board. Under these circumstances the treaty was negotiated. It dealt explicitly with the case of liquor ships hovering on our coast and being visited by small boats from shore. Of course, such small boats only came to the hovering vessel to get con-

traband goods. Both parties understood that. The plain inference is that such trading does not render the hovering vessel amenable to seizure as long as she keeps to the high seas, except as provided in the treaty. I think both nations intended the treaty to deal with the matter in a complete way. If so, upon familiar principles of law, it is conclusive. See Texas & Pacific Ry. Co. v. Abeline Cotton Oil Co., 204 U. S. 427, 436, 437, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. The construction of it is a judicial question. Jones v. Meehan, 175 U. S. 1, at page 32, 20 S. Ct. 1, 44 L. Ed. 49. I have no doubt that it is constitutional. It follows that each of the libels must be dismissed."

In the above case the contention was made that even though the vessel had been seized beyond the limits permitted by the Treaty, its seizure was justified under international law, and that the Treaty did not cut down that alleged general right of seizure. The Court refused to consider any alleged general right of seizure under international law, holding that the Treaty dealt with the entire matter of seizure in a complete way. Application for writ of certiorari was dismissed by the Supreme Court on February 1, 1926, on motion of the Solicitor General. 270 U. S. 666, 46 Sup. Ct. 209, 70 L. Ed. 789.

In *The Sagatind,* 11 F. (2d) 673, the Circuit Court of Appeals for the 2nd Circuit held:

"We agree with The Frances Louise, (D. C.) 1 F. (2d) 1004, that these treaties exclusively determine the status of vessels of appropriate nationality lying off the shore of the United States; but nowhere in the treaties can any words be found indicating an intent on the part of the contracting parties to change or extend the limits of the territory of the United States. In fact, the contrary is plainly indicated by Article I of each treaty.

> "Whatever rights government derived from the treaties must be discovered in Article II of each document. Of this article, Section 1 relates wholly to search, and Section 3 to the distance from shore at which all rights may and must be exercised."

The United States did not appeal. In the same case (4 F. (2d)) 928-930) District Judge A. N. Hand said:

> "The foregoing treaty extends any limitation which might exist upon the jurisdiction of the court to proceed against offending vessels which may be subject to forfeiture for violations of our laws 'prohibiting the importation of alcoholic beverages' to such cases as may come within the terms of the treaty, and, I think, also implies as an alternative rule of treaty-made law that vessels shall not be proceeded against for violation of such laws when seizure was made beyond the distance from our coast prescribed in the treaty. In other words, the treaty completely deals with the extreme right of seizure upon which initial jurisdiction of the cause of forfeiture must depend."

In The *Majorie E. Bachman,* (D. C. Mass.) 4 F. (2d) 405, 408, the Court said (Morton, J.):

> "Moreover, as to British vessels, this country has expressly agreed not to seize them, except within the provisions of the Treaty. As to them, if there is no case under the Treaty, there is no case at all when they are on the high seas."

Application for writ of certiorari was dismissed by the Supreme Court February 1, 1926, on motion of the Solicitor General. 270 U. S. 666, 46 Sup. Ct. 209, 70 L. Ed. 789.

The Treaty deals completely with the present case and the above decisions clearly support our view. The

speed of the Mazel Tov was found as a fact by the District Court to be between 9 and 10 knots an hour. She was seized at a greater distance from our coast than she could traverse in one hour, even though the place of seizure was 11½ miles from the Coast of the United States.

The Constitution of the United States declares a Treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. *Sullivan* v. *Kidd,* 254 U. S. 433, 440, 41 Sup. Ct. 158, 65 L. Ed. 344.

The present Treaty completely sets forth what is agreed by both parties to the Treaty and exactly what may be done by each. No legislation was necessary to put the Treaty into effect. The rights of both nations, contracting parties, and all citizens or subjects of both are therein defined.

During the period between January 23, 1924, when the Treaty was signed, and May 22, 1924, when it was proclaimed by the President, certain hearings in Congress were held with respect to the Treaty. Bills were introduced that were drawn practically in the language of the sections of the Tariff Act involved here, on the theory that the Treaty required legislation, and on March 3, 1924, the Secretary of State addressed a communication to the House Committee on Foreign Affairs in part as follows:

> "The proposed treaty is, in a strict sense, self-executing, requiring no legislation on the part of Congress to make it effective."

This statement satisfied the members of the Committee, as no further action was taken with respect to

the bills that were introduced and the hearings that had been held. (65 Cong. Rec. pt. 7, page 6723—April 19, 1924—Hearings House Committee on Foreign Affairs Res. 174, 68th Cong., 1st sess., Feb. 20 and March 7, 1924.)

It was obviously the intent of the United States to seize ships engaged in the rum-smuggling business and any applicable provisions of the American law might be invoked. While the Treaty does not specify or enumerate what laws would be applicable, it is now certain that the National Prohibition Act and the Tariff were intended to be limited by the Treaty.

In the case of *Ford* v. *United States,* 273 U. S. 593, in an opinion written by Chief Justice Taft, the Court said at page 618:

> "The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it within an hour's sail from its coast beyond its territorial jurisdiction and on the high seas, to seize British actual or would be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the three-mile limit for the same offenses in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them."

The weight of authority certainly sustains the view first enunciated by Judge Morton in the case of *The Frances and Louise,* that the Treaty deals completely with the subject and excludes all territorial seizures not made in conformity with their terms. This view has been followed by two Circuit Courts of Appeals, in the case of *The Quadra,* 10 F. (2d) 339, 346; *The Sagatind,* 11 F. (2d) 673; and by District Court Judge

Letts in this case, and by this Court in *Ford* v. *U. S.*, *supra.*

It seems strange that after the United States obtained foreign consent to seizures within a zone beyond the territorial limit, that they should attempt in a case not permitted by the Treaty to proceed to take jurisdiction under an Act of Congress that has never received the consent or acquiescence of the foreign government, and which was superseded and repealed in part by the Treaty.

This point was clearly enunciated in the statement of the Secretary of State of July 19, 1923, to the British Government, wherein he said:

> "It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States."
>
> M. S. Records, Department of State.

In the recent case of *United States* v. *Maul*, 274 U. S. 501, in the concurring opinion Justice Brandeis said:

> "Congress cannot have intended to confer the general authority to seize foreign vessels upon the high seas. * * * There is no foundation for the assumption of the claimant that the first paragraph of Section 581 was intended as the exclusive grant of the power to seize. The primary purpose of that paragraph was not to provide for the seizure of American vessels of known or suspected guilt. It was to facilitate, by means of boarding and examination of manifest before arrival in port, both the entry of admittedly innocent vessels and the collection of revenues. This end was fur-

thered by enabling customs officers to board and search any vessel, foreign or domestic, within the stated limits, without the necessity of establishing probable cause. The authority to board and search foreign vessels beyond the territorial limits would doubtless not have been implied as a mere incident of the customs officers' duties, and it is probable that the authority to board and search American vessels in the absence of probable cause was not regarded as clear. * * *

Neither in the negotiations nor in the conventions was any reference made to a 12-mile limit. The limitation agreed upon was an hour's run from our coast. The distance covered by the hour's run would often greatly exceed 12 miles from our coast. But Congress did not deem it necessary to enact supplementary legislation in order to make the conventions effective."

The United States in spite of its own twelve-mile statute had, prior to the Treaty, protested against the unreasonable exercise of a similar power on the part of Mexico, and reserved all rights relative to the Russian Law of 1909.

The United States, both through its courts and executive departments, has indicated that only in cases where contact with shore can be established and in the case of hot pursuit did it insist upon the right to seize vessels on the high seas beyond the three-mile limit and within four leagues for violation of local law.

The Circuit Court of Appeals erred in vacating the decrees of the District Court and holding the seizure was valid under Section 581 of the Tariff Act. No seizure can be made outside the Treaty distance. It excludes all seizures not made in conformity with its terms. The Treaty deals completely with the question presented here and the seizure is unlawful. This case does not present a state of facts consistent with the

position of the United States in seizing vessels under the theory of "Unit of Control" or "Hot Pursuit."

The Court found that the Mazel Tov was never in the territorial waters of the United States; that it did not intend to approach nearer than four leagues from the coast and that the seizure being unlawful no penalties could be assessed against her. The Mazel Tov did not violate any law of the United States, and being seized at a point beyond that provided for by the Treaty is not subject to any laws of the United States made applicable by the Treaty in a proper case.

V.

Section 581 of the Tariff Act of 1922 Was Passed By Congress At the Risk of International Complications for the Purpose of Searching and Seizing British and Other Foreign Liquor Vessels Pending Negotiations of Rum-Smuggling Treaties.

An examination of the debates in Congress at the time of the passage of Sections 581 and 584 of the Tariff Act of 1922 discloses that on July 6, 1922, Senator Sterling proposed the following amendment to this Section:

> "Officers of the Customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within six marine leagues of the coast of the United States, and hail, stop and board such vessel in the enforcement of the laws prohibiting, regulating, taxing or relating to the liquor traffic.
>
> "The provision of the National Prohibition Act and other laws relating to intoxicating liquors shall be in full force and effect within six marine leagues of the Coast of the United States and shall

be enforced by such officers who shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, Chapter 22, First Statutes at Large, page 668), upon Customs Officers in the enforcement of the Customs Laws."

On August 19, 1922, Senator Sterling filed the following amendment modifying the original amendment of July 6, 1922:

"Officers of the customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within 4 marine leagues of the coast of the United States, and hail, stop and board such vessel in the enforcement of the laws prohibiting, regulating, taxing, or relating to the liquor traffic; and such officers shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, ch. 22, 1 Stat. L. 668) upon customs officers in the enforcement of the customs laws."

He carefully explained to Congress that he thought Congress could extend the 3-mile limit, but at the risk of international complications which might subject the United States to claims for damages because of interference with vessels of other nations. He said further:

"Let me say to the Senator that I hope arrangements will be made with other nations covering that matter. I think the Secretary of State is in entire good faith endeavoring to make such an arrangement."

Mr. Sheppard (co-author of dry law):

"I trust the Secretary of State will be sucessful.

> It is a matter, however, which we cannot allow to rest until permanently and satisfactorily settled."

Mr. Sterling:

> "I agree with the Senator from Texas." (See Cong. Rec., Vol. 62, Pt. 2, 67th Congress, 2nd Sess., p. 11593.)

It seems clear that the reason for the passage of this Section was to cover the period of the pending negotiations for a Treaty with Great Britain to allow seizure of British rum-smuggling ships, depending upon the acquiescence of the foreign nations.

VI.

Congress Did Not Intend to Alter the Status and Effect of the Treaty of 1924 When It Re-enacted in 1930 Sections 581 and 584 of the Tariff Act of 1922, and the Treaty Amounts to a Limitation of These Sections.

An examination of the Congressional Record, committee hearings and the original Tariff Bill of 1930 as introduced in Congress, discloses that the pertinent sections of the Tariff Act of 1930 here involved (c. 497, 46 Stat. 590, 747, 748 and 751) were re-enacted in 1930 without any debate or amendments thereto. The Tariff Act as finally passed indicates that Congress did not intend in any way to affect the provisions of the Treaty entered into in 1924.

Article V of the Treaty provides that the Treaty

> "shall remain in force for a period of one year from the date of ratifications, and if no notice is given by either party three months before the expiration of the year the Treaty will continue in force for another year and so on automatically, etc."

No overt act was taken by either party and the re-enactment of Section 581 of the Act of 1922 in the Act of 1930 cannot be said by any stretch of imagination to be notice by the United States that the Treaty is to terminate.

Treaties and laws of the United States are both declared by the Constitution to be the supreme law of the land. It has frequently been declared that so far as a treaty operates of its own force as municipal law it supersedes prior inconsistent acts of Congress.

This principle has been applied in the following cases:

United States v. *Schooner Peggy,* 1 Cranch. 103.
Headmoney Cases, 112 U. S. 580, 599.
The Chinese Exclusion Case, 130 U. S. 581.
Horner v. *United States,* 143 U. S. 570.
Fong Yue Ting, 149 U. S. 698.
Johnson v. *Browne,* 205 U. S. 309.
Charlton v. *Kelly,* 229 U. S. 447, 463.
United Shoe Machinery Co. v. *Duplessis Shoe Machinery Co.,* 115 Fed. 842.

When the two relate to the same subject the Courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either, but if the two are inconsistent the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self-executing. *Whitney* v. *Robertson,* 124 U. S. 190.

Mr. Justice Harlan, in speaking for the Court in *United States* v. *Lee Yen Tai,* 185 U. S. 213, although no conflict between the treaty and statute in question was found to exist, added:

> "That it was competent for the two countries by treaties to have superseded a prior Act of Con-

> gress on the same subject is not to be doubted, for otherwise the declaration in the Constitution that a treaty concluded in the mode prescribed by that instrument shall be the supreme law of the land would not have due effect. As Congress may by statute abrogate, in so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior Act of Congress on the same subject."

In the case of *Charlton* v. *Kelly*, 299 U. S. 477, Mr. Justice Lurton, speaking for the Court, said:

> "Of course, the effect of the supplemental treaty of '84 being later than the statutory requirements above referred to is to supersede the statute in so far as there is a necessary conflict in carrying out the extradition obligations between this country and Italy."

If the Treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

There is little difficulty in concluding that Article III of the Treaty, which provided no forfeiture or penalty should attend the transportation of sealed liquors in American waters was self-executing, in other words, no legisation was required to give it effect. The treaty, *ipso juri*, superseded and repealed so much of the Prohibition Act as was inconsistent therewith. The doctrine that subsequent treaties override legislative acts is well-established. See *Davis* v. *Concordia*, 9 Howe 280, 13 L. Ed. 208; *Whitney* v. *Robertson*, *supra*, and other authorities collected; 5 *Moore's Digest* 370.

It certainly follows that if the above contention is correct, and we believe it to be, that the provisions of

Article II of the Treaty superseded and repealed so much of the Tariff Act as was inconsistent therewith, and re-enactment of in 1930 of any of the inconsistent sections of the 1922 act are superseded and repealed as long as the Treaty remains in force.

VII.

The Libels Under Section 584 Should Not be Sustained in View of the Locality of the Seizure, Being at a Point Beyond That Provided By the Treaty.

Section 584 of the Tariff Act is to furnish customs officials the right to examine manifests and to inform our revenue officers what goods are being brought into the country and to provide a safeguard against goods being brought into this country on a vessel and then smuggled ashore. It was for those purposes and to forestall that danger to the revenue that the statute in question was passed. It is explicitly restricted to vessels or vehicles bound to the United States.

In the present case the evidence discloses that at the time the Mazel Tov was boarded by officers of the Coast Guard the master was under the impression that he was at least twelve miles from the shore of the United States. The commander of the Coast Guard vessel informed the master that he was eleven and one-half miles from the United States. The District Court in its opinion stated that the master did not intend to come within the territorial limits of the United States. The Court of Appeals erred in disturbing the finding of the District Court when no motion on behalf of the United States for a trial *de novo* was filed and its conclusion based on the testimony was incorrect. The record does not disclose any unlading and cases in which vessels came into the territorial waters of the

United States or were found to have been bound to the United States are not applicable in so far as the Mazel Tov is concerned.

It follows that if the seizure was unlawful, as we contend, the Government should not be permitted to attempt to collect penalties under Section 584, which statute is directed wholly to cases bound for the United States, and to permit such assessment is to go to the extreme limit in extending this statute by judicial construction.

In the present case, the ship's papers were promptly produced, including a manifest (R. 22-24).

Section 584 is to facilitate a protective and general examination of vessels and cargoes when the vessel has arrived in the United States.

In *The Sylvia II*, 28 F. (2d) 215 (Dist. Ct. Mass.), which involved the seizure of a British schooner within the twelve-mile limit, District Court Judge Morton said:

> "On all the evidence I am satisfied that The Sylvia II was at the time of the seizure within 12 miles of the shore of Cape Cod. She had not unladen any of her cargo nor been within any territorial waters of the United States since taking it on board, nor had she been in contact with any boats from the shore nor been in contact with the shore herself. She was not and had not been during the voyage within a distance from the coast which she could traverse in one hour. Her master did not intend to come within 12 miles of our coast. His doing so was a mistake on his part. That the cargo was destined ultimately to this country and that its destination was known to the master of the Sylvia II is clear. * * * The ground of forfeiture alleged against this vessel is hardly more than a colorable pretense. Her real offense is that she was hovering on our coast with cargo for

> smugglers. * * * Upon the facts stated I rule that the Sylvia II was not bound for the United States. * * *
>
> "It is unnecessary to decide whether as to British vessels the 12-mile limit has been superseded by the one hour's distance specified by the treaty, but I may say that *Ford* v. *United States,* 273 U. S. 593 at p. 609, 47 Sup. Ct. 531, 71 L. Ed. 793, seems to me not inconsistent with the view which I expressed in *The Frances Louise,* (D. C.) 1 F. (2d) 1004."

In the case of *The George and Earl,* (D. C. East. Dist.) 30 F. (2d) 441, which was the seizure of a British schooner beyond the three-mile limit, District Judge Inch said:

> "Unless I can find that the vessel was so bound to the United States there was no right to board her and seize her for not producing a manifest. She did not become bound to the United States because she was subsequently towed there by a Coast Guard boat. I am not unmindful of the suspicious circumstances that always arise from a cargo of rum near our shores; but suspicion is not proof and to forfeit a vessel or a cargo under our laws requires proof of some sort which indicates at least a probable cause for the suit.
>
> "It was not unlawful for this schooner to be sailing with a cargo of liquor outside the territorial jurisdiction of the United States. *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 43 Sup. Ct. 504, 67 L. Ed. 894."

See also the concurring opinion of Justice Brandeis in *U. S.* v. *Maul, supra.*

We submit that the seizure is in violation of the Treaty and Section 584 cannot be construed to apply to the present case.

VIII.

Question Properly Raised Below: The Controlling Question in the District Court and the Court of Appeals Was Whether the Seizure Was Lawful in View of Treaty Provisions and the Government Should Not Be Permitted to Change the Theory of the Case in This Court on Review.

In the first libel filed by the Government it was alleged in part (Libel 1646, R. 2) paragraph five:

> "The Mazel Tov, its speed and the speed of such other vessel or vessels was such that it could and did reach the coast of the United States by traversing the distance from the coast to the Mazel Tov within one hour."

Paragraph nine, in part (R. 3):

> "Contrary to the form of the statute and of the Treaty between the United States and Great Britain in such case made and provided."

In the second libel filed (1647, R. 6) paragraph three states, in part:

> "The Mazel Tov, its speed and the speed of such other vessel or vessels was such that it could and did reach the coast of the United States by traversing the distance from the coast to the Mazel Tov within one hour."

In the answers and exceptions the claimant respectfully stated that the vessel was not seized within the territorial limits of any jurisdiction of the United States, and further denied the allegation of any violation of the provisions of the Treaty between the United States and Great Britain, as alleged in the Government's libel.

The petitioner intervened and filed a claim protesting—

> "That the seizure of the Mazel Tov was in violation of the laws and statutes of the United States of America, etc."

The Government attempted to prove that the Mazel Tov could traverse the distance from the point of seizure to the United States in less than one hour.

The evidence at the trial was devoted to questions raised by the answers and exceptions and the Court proceeded in its opinion to determine whether or not the seizure was valid in accordance with the provisions of the Treaty between the United States and Great Britain.

In its exception upon appeal the United States did not contend that the question of the effect of the Treaty upon the validity of the seizure had not been properly raised, but contended that the Court had erroneously decided the question of such effect (R. 87-89). In its brief on appeal it questioned whether or not the legality of the seizure under the Treaty was in issue under the pleadings and whether or not all questions of jurisdiction were waived. The Circuit Court of Appeals ignored this point and held that the seizure at the place as found by the District Court was valid under the Tariff Act which was in no way modified by the Treaty.

We contend that the Government is estopped to urge that the question before this Court was not properly at issue below, or that even though the seizure is irregular and unlawful the libels can be sustained.

It is believed that the Government in its brief will suggest that the question of the validity of the seizure should have been raised by a preliminary and special plea to the jurisdiction and that the point was waived

by the filing of an answer upon the merits, even though the point was raised in such answer.

We submit:

(1) That there is no basis whatever, either in authority or in practice, for the suggestion that in a proceeding *in rem* in admiralty for the forfeiture of a foreign vessel the failure to file a separate and special plea to the jurisdiction of the Court is fatal to the consideration of the question of the validity of the seizure of the vessel, when raised *in limine* in the answer and the exceptions.

(2) Whatever may be the better practice, the Government is not now in a position to contend that the issue is not presented on this record—"it being clear that there is no jurisdictional defect in the pleadings."

Few questions are more troublesome than those relating to the pleading of jurisdictional questions. Whether such a question has been properly raised in the record has been made to turn not only upon the nature of the question, but upon the character of the Court, the status of the party raising it, and the time and circumstance of the pleading.

We do not believe determination of this case will involve any question in this vexing field relating to the proper pleading of objections to the jurisdiction of the Court, we do not feel that the issue raised in reality related to the jurisdiction of the Court. *Rather the question of the validity of the seizure related to the authority of the administrative officers to have made the seizure at the place they did* (*Crowell* v. *Benson*, 285 U. S. 76, L. Ed. Advance Opinions, p. 369, note 17). Thus the question raised by the locality of the seizure was one of the merits of the cause—whether the penalties could be lawfully imposed; whether the statute had been violated. The question thus presented was determined by the Court in the exercise of its juris-

diction *in rem* over a vessel within its possessions and depended upon the application of the statute and Treaty. If this be true, then indisputably the question under the Treaty was properly raised as a defense in the answer and exceptions.

But if the question arising under the Treaty did go to the jurisdiction of the Court, it must have related either to its jurisdiction over the parties or over the subject-matter. It has frequently been said that objections to the jurisdiction of a Court over the parties may be waived (*Ford* v. *United States,* 273 U. S. 593, 606), but that questions relating to the jurisdiction of Courts over the subject-matter may be raised at any time, since such jurisdiction cannot be conferred by consent of the parties. *Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 54, 59; *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10, 13, 18; *Mansfield R. Co.* v. *Swan,* 111 U. S. 379, 383-384.

This being a proceeding *in rem,* this question relating to the construction of the Treaty, if treated as going to the jurisdiction of the Court, cannot be regarded as an objection to the jurisdiction over the parties. The Court had jurisdiction over the vessel, and at the very least had jurisdiction to determine its own jurisdiction. Therefore, if the question goes to the jurisdiction of the Court at all, it is to its jurisdiction over the subject-matter—an objection which cannot be waived and may be raised at any time. Moreover, it is arguable that, since an appeal in admiralty is a trial *de novo,* the question under the Treaty—whatever its nature—might have been raised for the first time in Circuit Court of Appeals; *and it is not denied that in that Court the issue under the Treaty was regarded as the controlling point in the case.*

Nor is this case to be confused with those which hold that a seizure of a domestic vessel in foreign waters is

at most a trespass which does not raise any question militating against the jurisdiction of the proper Federal Court on a subsequent valid seizure of the vessel by civil authorities. *The Richmond,* 9 Cranch 102; *The Merino,* 9 Wheat. 391, 402. Here the question relates to the lawfulness of the imposition of penalties upon a *foreign* vessel under the Tariff Act, and turns upon whether seizure of the vessel at a particular locality upon the high seas was a violation of our Treaty with Great Britain.

But whatever be the character of the question raised under the Treaty—whether it be regarded as going to the jurisdiction of the Court or not—we contend that on the record it was raised in a manner which is timely and proper under the *admiralty* practice. We submit that the "serious doubts" of the Government are engendered by the assumption—*not founded upon authority*—that the strict common law rule relating to the order of pleadings, whereby pleas in abatement must precede pleas to the merits and are waived when the latter are filed, is applicable to proceedings *in rem* in admiralty.

There was clearly no express waiver in the Courts below of the precise point which it is now sought to have reviewed in this Court. The point was treated by both Courts below as having been properly put in issue, and was decided.

There is no case holding that the question of the validity of the seizure of a foreign ship, in view of the Treaty, may not be properly raised under the admiralty practice by answer and exceptions.

If considered as a question going to the jurisdiction of the Court, it is not a question of jurisdiction over the person for the proceeding is *in rem;* it must, therefore, be an objection to the jurisdiction of the

Court over the subject-matter, and, therefore, may be raised at any time.

The question is not really of the jurisdiction of the Court, but of the authority of the administrative officers, and its determination, which turns upon the construction of the Treaty and application of the statutes, was within the jurisdiction of the Court and the question was properly put in issue in the answer and exceptions.

Assuming, but not admitting, that it would have been better pleading to challenge the validity of the seizure by a separate special plea to the jurisdiction, the government is bound by the theory upon which the case was tried in the trial court and heard in the Circuit Court of Appeals, and is estopped to contend that the question presented to this Court was not properly in issue below. Petitioner's objection to the validity of the seizure raised by the answers and exceptions were not subjected to exception or objection by the government at trial; both parties introduced evidence upon the issue and the opinions of both trial court and Circuit Court of Appeals proceeded upon the theory that the controlling question was whether the seizure was lawful in view of the Treaty stipulations. The language of Mr. Justice Van Devanter, speaking for the Court in *San Juan Light Co.* v. *Requena,* 224 U. S. 89, 96, 97, is strikingly in point:

> "The trial proceeded upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. *Effect must, therefore, be given to the*

well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

This is a well-settled and generally accepted rule. See *Milton* v. *Pensacola Bank & Trust Co.*, 190 F. 126, 136 (C. C. A. 6th); *Brockenborough* v. *Champion Fibre Co.*, 176 F. 840, 842 (C. C. A. 4th); *Sutherland* v. *Sutherland*, 102 Ia. 535; *Tarbul* v. *Royal Exc. Shipping Co.*, 110 N. Y. 170; *Morrison* v. *Atkinson*, 16 Okla. 571; *Knoop* v. *Kelsey*, 102 Mo. 291, 10 R. C. L. 701, Sec. 281.

It appears from an examination of the reported cases in the District Courts of the United States that it is the practice to raise in the answer and exceptions any question affecting the jurisdiction of the Court. The same practice has been followed whenever the validity of the seizure has been questioned.

The Government in its memorandum stated that conflicting opinions upon the question here involved makes the case of sufficient importance to warrant granting the writ. The Government pointed out in its memorandum that there was some doubt in its mind that the question had not properly been raised. This Court granted the writ of certiorari on October 10, 1932. It is safe to assume that this Court did not deem the suggesion of the Government material.

Conclusion.

The decree of the Court of Appeals should be vacated and the decrees of the District Court be affirmed.

Respectfully submitted,

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APPENDIX.

A.

The pertinent provisions of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979, are as follows:

Section 581: *Boarding vessels.*

"*Boarding Vessels.*—Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, *and to arrest*, or, in case of escape or attempted escape, *to pursue and arrest any person* engaged in such breach or violation.

"Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws."

B.

The pertinent provisions of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, are as follows:

Section 581: *Boarding vessels.* Re-enacted verbatim section 581 of the 1922 Act.

Section 584 of the Tariff Act of 1930:

"*Falsity or lack of manifest*—(U. S. C. Sup. V, Title 19, Sec. 1584)

"Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500: *Provided,* That if the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

"If any of such merchandise so found consists of smoking opium or opium prepared for smoking,

the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall, notwithstanding the proviso in section 594 of this Act (relating to the immunity of vessels or vehicles used as common carriers), constitute a lien upon such vessel which may be enforced by a libel *in rem;* except that the master or owner of a vessel used by any person as a common carrier in the transaction of business as such common carrier shall not be liable to such penalty and the vessel shall not be held subject to the lien, if it appears to the satisfaction of the court that neither the master nor any of the officers (including licensed and unlicensed officers and petty officers) nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that such smoking opium or opium prepared for smoking was on board. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law."

C.

Pertinent provisions of the Treaty with Great Britain dated May 22, 1924 (43 Stat. 1761):

"Article I.

"The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

"Article II.

"(1) His Brittanic Majesty agrees that he will raise no objection to the boarding of private ves-

sels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaning whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the *right under this article can be exercised.*

"Article V.

"This Treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

"Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the Treaty.

"If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the Treaty shall lapse.

"If no notice is given on either side of the desire to propose modifications, the Treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the Treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the Treaty shall lapse.

"Article VI.

"In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded.

"The present Convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Brittanic Majesty; and the ratifications shall be exchanged at Washington as soon as possible.

"In witness whereof, etc."

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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1932

FRANK COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

NOTE OF DECEMBER 5, 1932, ADDRESSED TO THE HONORABLE HENRY L. STIMSON, SECRETARY OF STATE OF THE UNITED STATES, BY THE HONORABLE W. D. HERRIDGE, MINISTER OF CANADA

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The following note was left at the Department of State by the Canadian Minister on December 5, 1932. The Government brings this note to the attention of the Court as an expression of the views entertained by the Government of Canada upon the interpretation of the Treaty of 1924 with Great

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Britain, to be considered in connection with the Government's brief already filed herein:

DECEMBER 5TH, 1932.

No. 219.

SIR:

Under instructions from the Secretary of State for External Affairs of Canada, I have the honour to bring to your attention the legal proceedings arising out of the seizure by the United States Coast Guard on November 1st, 1930, of the Canadian vessel MAZELTOV. It is understood that the Supreme Court of the United States has granted the petition of the appellant in this case (*Cook* v. *The United States of America*, No. 82) for a writ of certiorari, and that, accordingly, this matter will in the near future come before the Supreme Court for its consideration.

His Majesty's Government in Canada have considered the Opinion of the United States Circuit Court of Appeals for the First Circuit, delivered by Mr. Justice Bingham, with regard to this seizure. It is understood that the proceedings have established that the MAZELTOV, at the time of the seizure, was on the high seas, beyond United States territorial waters, and at a point that was more than one hour's sailing distance from the shore. It seems to be clear that, in the circumstances, the seizure and subsequent condemnation of the MAZELTOV can not be justified by the provisions of the Convention concluded at

Washington on the 23rd January, 1924. It is also understood that the court proceeded upon the view that the seizure and condemnation of the vessel were justified by the provisions of the Tariff Act of the United States, and that the provisions of that legislation were not impaired by the conclusion of the 1924 Convention.

Whether or not the Courts of the United States of America regard themselves as being bound by the provisions of this legislation which, in the absence of treaty stipulation, purports to justify the seizure of British ships upon the high seas, it seems to be clear that such seizures are not justified by International Law. It is the view of the Government of Canada that the 1924 Convention was intended by both of the high contracting parties to constitute a complete code, covering all circumstances in which the exercise of jurisdiction over British ships on the high seas could be justified. It can be confidently asserted that it was understood by both of the high contracting parties during the negotiations, that there would be no disposition on the part of the authorities of the United States of America—and that the Convention would not justify any such attempt—to seize a British vessel, save within the conventional limits. Accordingly, it would seem that the seizure of the MAZELTOV and its forfeiture, if continued, would not be justified by International Law, or by the terms of the Convention, and that it would be directly contrary to the understandings of the parties

which formed the basis of the agreement embodied in the Convention.

In these circumstances, I am desired to urge that the Government of the United States should give consideration to the propriety of taking such executive action as may be necessary to prevent the possible establishment of a conflict between the legal position under the municipal legislation of the United States, as exemplified in the decision referred to above, on the one hand, and the position established by the Convention and by the International Law and practice, on the other hand. Any other course would render nugatory the limitations imposed by the Convention and would tend to frustrate the co-operation rendered by His Majesty's Government in Canada over what is now a substantial period of years, which has provided effective assistance to your Government in curtailing, and, in so far as Canadian vessels are concerned, almost eliminating the contraband traffic on the coasts of the United States.

I have the honour to be, with the highest consideration, Sir,

Your most obedient, humble servant,

(Signed) W. D. HERRIDGE.

Respectfully submitted.

THOMAS D. THACHER,

Solicitor General.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1933